

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

Civil Action No. 08-cv- 350

DINE CITIZENS AGAINST RUINING OUR ENVIRONMENT,  
SAN JUAN CITIZENS ALLIANCE,

Plaintiffs,

v.

OMAR BRADLEY, in his official capacity as Navajo Regional Director, Bureau of Indian Affairs, BUREAU OF INDIAN AFFAIRS, a federal agency within the U.S. Department of Interior, U.S. DEPARTMENT OF INTERIOR,

Defendants.

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**COMPLAINT**

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## **I. INTRODUCTION**

1. Omar Bradley, in his official capacity as Navajo Regional Director, Bureau of Indian Affairs, the Bureau of Indian Affairs, a federal agency within the U.S. Department of Interior and the U.S. Department of Interior (hereinafter, “BIA” or “Agency” or “Defendant”) violated the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, by withholding agency records requested by Diné Citizens Against Ruining Our Environment (“Diné C.A.R.E.”) and San Juan Citizens Alliance (“Alliance”)(hereinafter “Plaintiffs”) that concern the proposed Desert Rock Energy Project (or “DREP”) and/or BHP’s Navajo Mine both located in Northwest New Mexico.

2. These projects are the subject of considerable public controversy concerning the impacts of expanding the coal mining and coal-fired power plant complex located in Northwest New Mexico and on the Navajo Reservation. Without the requested records, Plaintiffs are unable to fully assess and review the federal government’s activities regarding these controversial coal projects.

3. This lawsuit seeks to remedy the agency’s failure to lawfully respond to three (3) requests for information made by Plaintiffs under FOIA on August 22, 2007, July 18, 2007 and May 3, 2007.

4. With regard to Plaintiffs’ August 22, 2007 FOIA and subsequent November 2, 2007 appeal, Plaintiffs seek an Order(s) pursuant to FOIA that: 1) finds that the Defendant has violated FOIA; 2) orders Defendant to produce all unlawfully withheld records by a date certain; 3) enjoins Defendant from withholding the requested agency records. 5 U.S.C. 552(a)(4)(B). This lawsuit is necessary because Defendant failed to make a determination with respect to Plaintiffs’

November 2, 2007 appeal within twenty (20) days. 5 U.S.C. §552(a)(6)(A)(ii). Agencies may notify requesters of a ten (10) day extension based on unusual circumstances and agencies may seek to limit the request. 5 U.S.C. §552(a)(6)(B). No such determination, notification of an extension, or request for limitation has been made by Defendant.

5. With regard to Plaintiffs' August 22, 2007 FOIA and subsequent November 2, 2007 appeal, Plaintiffs have exhausted all administrative remedies.

6. With regard to Plaintiffs' July 18, 2008 FOIA and subsequent October 16, 2007 appeal, Plaintiffs seek an Order(s) pursuant to FOIA that: 1) finds that the Defendant has violated FOIA; 2) orders Defendant to produce all unlawfully withheld records by a date certain; 3) enjoins Defendant from withholding the requested agency records. 5 U.S.C. 552(a)(4)(B). This lawsuit is necessary because Defendant failed to make a determination with respect to Plaintiffs' October 16, 2007 appeal within twenty (20) days. 5 U.S.C. §552(a)(6)(A)(ii). Agencies may notify requesters of a ten (10) day extension based on unusual circumstances and agencies may seek to limit the request. 5 U.S.C. §552(a)(6)(B). No such determination, notification of an extension, or request for limitation has been made by Defendant.

7. With regard to Plaintiffs' July 18, 2008 FOIA and subsequent October 16, 2007 appeal, Plaintiffs have exhausted all administrative remedies.

8. With regard to Plaintiffs' May 3, 2007 FOIA and subsequent June 14, 2007 appeal, Plaintiffs seek an Order(s) pursuant to FOIA that: 1) finds that the Defendant has violated FOIA; 2) find that Plaintiff Diné C.A.R.E. qualifies for a fee-waiver under FOIA, 5 U.S.C. §552(a)(4)(A)(iii) and (viii); and, (3) orders Defendants to process Plaintiffs' May 13, 2007 FOIA request within twenty (20) working days. 5 U.S.C. 552(a)(4)(B). This lawsuit is

necessary because Defendant failed to make a determination with respect to Plaintiffs' June 14, 2007 appeal within twenty (20) days. 5 U.S.C. §552(a)(6)(A)(ii). Agencies may notify requesters of a ten (10) day extension based on unusual circumstances and agencies may seek to limit the request. 5 U.S.C. §552(a)(6)(B). No such determination, notification of an extension, or request for limitation has been made by Defendant.

9. With regard to Plaintiffs' May 3, 2007 FOIA and subsequent June 14, 2007 appeal, Plaintiffs have exhausted all administrative remedies.

10. By failing to fully, timely, and lawfully respond to Plaintiffs' FOIA requests, Plaintiffs' rights under FOIA as well as its ability to carry out its organizational mission have been severely impaired.

## **II. JURISDICTION AND VENUE**

11. This Court has jurisdiction over this action pursuant to 5 U.S.C. §552(a)(4)(B)(FOIA), and 28 U.S.C. § 1331 (federal question).

12. In the alternative, this Court has jurisdiction to review agency action and to order effective relief sought in this civil action pursuant to 28 U.S.C. §§ 1331 (federal question); 1346 (United States as defendant); 1361 (mandamus); 2201 (declaratory relief); 2202 (injunctive relief); and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* There is a present and actual controversy between the parties that is ripe for judicial review.

13. Venue in this Court is proper under 5 U.S.C. §552(a)(4)(B) as Plaintiffs reside in New Mexico and all documents requested by Plaintiffs concern issues related to and/or activities conducted by the federal government in northwestern New Mexico.

14. The Agency has failed to make a lawful determination on Plaintiffs' November 2, 2007

FOIA appeal within twenty (20) working days. 5 U.S.C. §552(a)(6)(A)(ii).

15. The Agency has failed to make a lawful determination on Plaintiffs' October 16, 2007 FOIA appeal within twenty (20) working days. 5 U.S.C. §552(a)(6)(A)(ii).

16. The Agency has failed to make a lawful determination on Plaintiffs' June 14, 2007 FOIA appeal within twenty (20) working days. 5 U.S.C. §552(a)(6)(A)(ii).

17. The failure to make a lawful determination on Plaintiffs' November 2, 2007, October 16, 2007 and June 14, 2007 FOIA appeals within twenty (20) working days is construed as a denial and waives exhaustion of administrative remedies that ordinarily apply in FOIA cases. 5 U.S.C. §552(a)(6)(C)(i).

18. The FOIA claims made in this Complaint are ripe for judicial review and Plaintiffs' harms can be remedied by an order of this court.

### **III. PARTIES**

19. Plaintiff DINE CITIZENS AGAINST RUINING OUR ENVIRONMENT ("Diné C.A.R.E.") was founded in 1988 and is a nonprofit, environmental organization based within the Navajo Nation homeland, which rests between mountains in Colorado, New Mexico and Arizona. Diné C.A.R.E. is comprised of all tribal members.

20. Many Diné C.A.R.E. members live in the area of the proposed Desert Rock Energy Project ("DREP") and the ongoing mining at the federally permitted Navajo Mine that is the subject of the FOIA requests and appeals. Many of these members have been or will be directly impacted by the development of the DREP and ongoing or expanded mining operations at the Navajo Mine. The FOIA requests seek information directly relevant to informed evaluation of the impacts of the DREP and Navajo Mine by Diné C.A.R.E. and its members.

21. Diné C.A.R.E. has established a reputation for educating, organizing and advocating for their tribal community, medicine and traditional people, and indigenous youth and elders in an effort to empower tribal members to organize, speak out and determine their own destinies. Members of Diné C.A.R.E. live or graze livestock on lands within the DREP and Navajo Mine. Many members are elderly. Many members only speak Navajo and do not speak English. Most Diné C.A.R.E. members in this area do not have phones, electricity or running water.

22. The records sought by Diné C.A.R.E. through FOIA will be widely distributed and disseminated by Diné C.A.R.E. to impacted tribal members living the DREP and Navajo Mine permit and lease area. Diné C.A.R.E. serves a crucial role in interfacing with tribal members and disseminating information released by the agency.

23. Diné C.A.R.E. has been vital to Navajo Nation community members and critical to the preservation and protection of tribal lifeways. In so doing, *Diné C.A.R.E.* has sought to expose and make public potential Federal agency corruption and significant environmental degradation occurring on the Navajo Nation and beyond. Diné C.A.R.E. is actively involved in, among other things, participating in the federal review and approvals related to the proposed DREP and Navajo Mine including the ongoing environmental analysis and documentation process mandated by the National Environmental Policy Act and conducted by the lead agency – the BIA.

24. Diné C.A.R.E. uses FOIA as an important avenue for keeping current with agency activities, and is harmed when it is denied documents to which it is entitled. Diné C.A.R.E. intends to continue its use of FOIA to access agency records in the possession of Defendant. One of the purposes of FOIA is to promote the active oversight role of public advocacy groups.

Diné C.A.R.E. uses FOIA to publicize activities of federal agencies and to mobilize the public to participate in the agency decision-making activities and in oversight. Diné C.A.R.E. intends to continue using FOIA requests to fulfill its oversight and advocacy role through scrutinizing agency records, a practice Congress intended to promote through the adoption of FOIA. Diné C.A.R.E. brings this action on its own behalf and on behalf of its adversely affected members.

25. SAN JUAN CITIZENS ALLIANCE (the “Alliance”) is a non-profit membership organization. The Alliance is comprised of approximately 200 New Mexico community members and landowners, almost all in northwest New Mexico. The Alliance advocates for the protection of public land and natural resources near and adjacent to the proposed DREP and Navajo Mine including the Chaco and San Juan Rivers. Alliance members use these areas for many health, recreational, moral, scientific, spiritual, professional, educational, aesthetic and other purposes. Because of the potential impacts from the DREP (and in particular impacts to the Chaco and San Juan Rivers), the Alliance has an organizational interest in, among other things, the BIA’s authorization of leasing of the DREP.

26. The Alliance is actively involved in participating in the federal review and approvals related to the proposed DREP and Navajo Mine including the ongoing environmental assessment process mandated by the National Environmental Policy Act and conducted by the lead agency – the BIA. The Alliance uses FOIA as an important avenue for keeping current with agency activities, and is harmed when it is denied documents to which it is entitled. The Alliance intends to continue its use of FOIA to access agency records in the possession of Defendant. One of the purposes of FOIA is to promote the active oversight role of public advocacy groups. The Alliance uses FOIA to publicize activities of federal agencies and to mobilize the public to

participate in Federal agency decision-making. The Alliance intends to continue using FOIA requests to fulfill its oversight and advocacy role through scrutinizing agency records, a practice Congress intended to promote through the adoption of FOIA. The Alliance brings this action on its own behalf and on behalf of its adversely affected members.

27. Both Plaintiffs have the experience and expertise to review the requested materials. Both use FOIA to obtain information about federal agencies and each makes information concerning the proposed DREP and mining at the Navajo Mine available to its members and members of the public through electronic and printed publications, public meetings, press releases, phone calls, administrative appeals, and litigation, among other means. Plaintiffs will make the information obtained from these requests available to its members and the general public and does not seek this information for commercial use. The requested information has never been made available to public.

28. Defendant BUREAU OF INDIAN AFFAIRS is responsible for responding to FOIA requests submitted to it and so is sued as a defendant in this action. The BIA has a decentralized FOIA program. FOIA requests are typically processed at BIA field offices.

29. Defendant OMAR BRADLEY is Navajo Regional Director, Bureau of Indian Affairs and responsible for responding to FOIA requests submitted to the BIA Navajo Field Office. As regional director, Mr. Bradley is responsible for ensuring that the BIA's Navajo Field Office complies with FOIA. Plaintiffs' August 22, 2007, July 18, 2007 and May 3, 2007 FOIA requests were directed to Mr. Bradley.

30. Defendant U.S. DEPARTMENT OF INTERIOR is responsible for responding to FOIA appeals submitted to it and so is sued as a defendant in this action. Among other things, the U.S.



DOI failed to make a lawful determination on Plaintiffs' November 2, 2007, October 17, 2007 and June 14, 2007 FOIA appeals within twenty (20) working days.

31. Plaintiffs use FOIA as an important avenue for keeping abreast and informed of Agency activities. Plaintiffs are harmed when they are denied documents to which they are entitled. Plaintiffs intend to continue to use FOIA to access agency records in the possession of Defendant. One of the purposes of FOIA is to promote the active oversight role of public advocacy groups. Plaintiffs use FOIA to publicize activities of federal agencies and to mobilize the public to meaningfully participate in federal decision-making processes regarding the proposed DREP and Navajo Mine. Plaintiffs intend to continue using FOIA requests to fulfill their oversight and advocacy roles through scrutinizing agency records, a practice Congress intended to promote through the adoption of FOIA. Plaintiffs bring this action on their own behalf and on behalf of their adversely affected members.

32. Defendant's violation of FOIA has denied Plaintiffs access to information contained in agency records to which Plaintiffs are entitled under FOIA. Without this information, Plaintiffs cannot provide themselves or their membership, or the general public, with information regarding the Defendant's activities authorizing, among other things, lease of land and water for the DREP or authorizing impacts to Navajo tribal members impacted by the Navajo Mine, key goals of Plaintiffs. Thus, Plaintiffs are injured in fact by Defendant's violations of FOIA. Plaintiffs' injuries can be redressed by this suit and granting of the remedies requested herein.

#### **IV. FACTS AND LAW**

33. This suit challenges Defendant's actions regarding FOIA requests made by or on behalf of Plaintiffs.

**A. Plaintiffs' August 22, 2007 FOIA Request (Desert Rock Request)**

34. On August 22, 2007, Plaintiff the Alliance filed a FOIA Request ("August 22, 2007 Request" or "Desert Rock Request") with the BIA.

35. The August 22, 2007 Request was submitted on behalf of the Alliance by Brad A. Bartlett, Esq., Managing Attorney for the Energy Minerals Law Center.

36. The August 22, 2007 Request sought information related to the proposed Desert Rock Energy Project including:

1. Any and all communications between Sithe Global LLC/Desert Rock Energy Company LLC and URS Corporation and its subcontractors (including Ecosphere Environmental Services);
2. Any and all communications between Diné Power Authority ("DPA") and URS Corporation and its subcontractors (including Ecosphere Environmental Services);
3. Any and all communications between Bracewell & Giuliani LLP, including but not limited to communications with Frank Maisano, and URS Corporation and its subcontractors (including Ecosphere Environmental Services);
4. Any and all agreements or contracts between the Bureau of Indian Affairs ("BIA") and URS Corporation;
5. Any and all agreements or contracts between the Sithe Global LLC/Desert Rock Energy Company LLC and URS Corporation; and,
6. Any and all communication protocols or memorandums of understanding between BIA and URS Corporation regarding communications with Sithe Global LLC/Desert Rock Energy Company LLC, DPA or any other party.

37. The August 22, 2007 Request sought specific records and categories of records which are routinely created or obtained as part of the agency's authorization of the Desert Rock Energy Project proposal. On information and belief, the requested documents are routinely obtained or created and held at the BIA offices in Gallup, New Mexico.

38. The records requested by Plaintiffs are critical to the public's informed evaluation of the Desert Rock Energy Project—a proposed 1,500 MW coal fired power plant on Navajo Nation lands in Northwest New Mexico.

39. The proposed Desert Rock Energy Project is currently the subject of a Draft Environmental Impact State (“DEIS”)(May 2007). The BIA is the lead agency in development of the DEIS.

40. The records requested by Plaintiffs’ Desert Rock Request include communications between URS Corporation, the company who prepared the DEIS for the BIA, and the proponents of the proposed power plant (Sithe Global LLC/Desert Rock Energy Company LLC, DPA and Bracewell & Giuliani LLP).

41. Many of the requested records are documents prepared under the mandate of the National Environmental Policy Act (“NEPA”). 42 U.S.C. 4332(2)(C). The Council of Environmental Quality promulgated regulations which confirm that NEPA process records are subject to release pursuant to FOIA requests. 40 C.F.R. §1506.6(f).

42. On October 5, 2007, the BIA responded to the Alliance’s FOIA. In response, the BIA stated that “[n]o documents were identified as responsive to the August 22, 2007 request.” The BIA provided no description or explanation of its search. The BIA response did not identify any search for records at the BIA’s consulting firms, including the URS Corporation.

43. The BIA’s October 5, 2007 response was timely appealed to the U.S. Department of Interior (“DOI”) appeals office on November 2, 2007.

44. On December 3, 2007, the BIA provided a letter claiming that the agency had now “determined that documents maintained by the BIA contractor may include responsive documents and a search is now underway.” Additionally, the BIA asserted that “further clarification is necessary to permit timely completion of our review and to allow the agency to better identify those documents of most interest to the requester.”

45. The Alliance provided a detailed response to the BIA's letter on December 4, 2007.

46. On January 25, 2008, the BIA provided a partial release of a select and limited number of communications between the URS Corporation and DPA and Sithe-Global. In so doing, the BIA asserted that URS is not an "agency consultant." The BIA goes on to assert that "URS is a private research and consulting organization contracted by the project proponent to assist the BIA in preparing the draft EIS..."

47. The DEIS identifies the "URS Team" as "consultants" to the BIA. *See* DEIS at 6-9, 6-10. Additionally, the DEIS identifies no less than twenty-four (24) URS consultants to the agency covering all facets of DEIS development. *See* DEIS at 6-9, 6-10.

48. Additional consultants to the BIA and identified in the DIES include Pacific Western Technologies, Anthropological Research LLC and Ecosphere Environmental Services, Clear Creek Associates and Miller Brooks for a total of thirty (30) consultants in all. *See* DEIS at 6-9, 6-10. By comparison, only four (4) BIA staff prepared and contributed to the DEIS. *See* DEIS at 6-8.

49. Upon information and belief, the URS Corporation is a consultant to the BIA on the Desert Rock Energy Project. Upon information and belief, the BIA has represented publicly that the URS Corporation is a contractor to the BIA.

50. Upon information and belief, Pacific Western Technologies, Anthropological Research LLC and Ecosphere Environmental Services, Clear Creek Associates and Miller Brooks are consultants to the BIA on the Desert Rock Energy Project. Upon information and belief, the BIA has publicly represented that Pacific Western Technologies, Anthropological Research LLC and Ecosphere Environmental Services, Clear Creek Associates and Miller Brooks are contractors to

the BIA

51. Upon information and belief, the BIA and Pacific Western Technologies, Anthropological Research LLC and Ecosphere Environmental Services, Clear Creek Associates and Miller Brooks have agreement(s) for work on the Desert Rock Energy Project DEIS.

52. Upon information and belief, the BIA and the URS Corporation have developed a work-plan for the Desert Rock Energy Project DEIS.

53. Upon information and belief, the BIA and the URS Corporation have an agreement for URS Corporation's work on the Desert Rock Energy Project DEIS.

54. Upon information and belief, the URS Corporation is required by the BIA to document in writing all information relevant to the Desert Rock Energy Project and place such information in a project file.

55. Upon information and belief, the URS Corporation is required by the BIA to maintain an administrative record for the Desert Rock Energy Project.

56. Upon information and belief, the administrative record maintained by the URS Corporation for the Desert Rock Energy Project includes incoming and outgoing correspondence from and to the URS Corporation.

57. Upon information and belief, the URS Corporation was highly encouraged by the BIA to use electronic mail to all for broad distribution of messages and provide a written record of communications with non-agency third parties.

58. Upon information and belief, the URS Corporation does not represent an interest of its own on issues related to the Desert Rock Energy Project. Upon information and belief, the URS Corporation advises the agency on issues related to the Desert Rock Energy Project.

59. Upon information and belief, the URS Corporation is assisting the agency in performance of the agency's own functions on issues related to the Desert Rock Energy Project.

60. Upon information and belief, the BIA has in the past asserted FOIA Exemption 5 (agency deliberative-process) to withhold URS Corporation communications with the BIA and other Federal agencies. Upon information and belief, the BIA has in the past asserted FOIA Exemption 5 (agency deliberative-process) to withhold URS Corporation communications with the non-agency third parties including the Navajo Nation.

61. On January 4, 2007, the DOI confirmed receipt of Plaintiffs' appeal and identified it as FOIA Appeal No. 2008-025. Among other things, the DOI stated that "[s]ince the Department has not made a determination on your appeal within the time limited set in the FOIA, you may seek judicial review under 5 U.S.C. §552(a)(4)(B)."

62. Defendant's letters and responses to Plaintiffs' August 22, 2007 Request failed to provide Plaintiffs with a lawful determination on Plaintiffs' request within twenty (20) days, and therefore Defendant has violated FOIA.

63. Defendant has failed to comply with FOIA by failing to make a detailed determination within twenty (20) days of receipt of Plaintiffs' November 2, 2007 appeal. Defendant has not identified unusual circumstances that might require an extension of time not to exceed ten (10) additional days. 5 U.S.C. §552(a)(6).

64. Defendant continues to illegally withhold documents in whole or in part requested by Plaintiffs on August 22, 2007. 5 U.S.C. §552(a)(6).

65. Plaintiffs have brought this case seeking judicial orders compelling timely and lawful compliance with FOIA and release of the records requested in Plaintiffs' August 22, 2007 FOIA

Request. In addition to vindicating Plaintiffs' statutory right to timely access to the requested agency records which are not subject to any specific FOIA withholding provision, Plaintiffs seek declaratory judgment and permanent injunction in order to halt any future pattern and practice by Defendant to delay and/or evade Plaintiffs' FOIA requests.

66. Plaintiffs intend to continue its use of FOIA to access agency records in the possession of Defendant. One of the purposes of FOIA is to promote the active oversight role of public advocacy groups. Plaintiffs use FOIA to publicize activities of federal agencies and to mobilize the public to participate in federal agency decision-making processes related to the proposed Desert Rock Energy Project. Declaratory and injunctive relief is necessary to protect Plaintiffs' continued oversight and advocacy through the well-established practice of scrutinizing agency records, a practice Congress intended to promote through the adoption of FOIA.

**B. Plaintiffs' July 18, 2007 FOIA Request (Desert Rock Water Records)**

67. On July 18, 2007, Plaintiffs the Alliance and Diné C.A.R.E. filed a FOIA Request ("July 18, 2007 Request" or **"Desert Rock Water Records"**) with the BIA.

68. The July 18, 2007 Request was submitted on behalf of Plaintiffs by Brad A. Bartlett, Esq., Managing Attorney for the Energy Minerals Law Center.

69. The July 18, 2007 Request sought information related to the Desert Rock Energy Project including:

1. Any and all agreements (including leases) in final or draft form between the Navajo Nation, Dine Power Authority and/or Desert Rock Energy Company LLC and related to use of waters of the Navajo Nation;
2. Any and all records related to "alternate sources of water" that are "available and could be convey to the site, if needed" as referenced in the Draft Environmental Impact Statement ("DEIS") at 4-43.

70. In a September 18, 2007 letter, the BIA identified three (3) responsive records concerning

the first category of requested records:

1. Large Water User Master Agreement between the Navajo Nation and Dine Power Authority (DPA);
2. Lease from the Navajo Nation to DPA for the Desert Rock Energy Project; and,
3. Sublease from the DPA to Desert Rock Energy Company, LLC.

71. The BIA's September 18, 2007 letter partially released item number 1 while redacting several pages pursuant to FOIA Exemption 4, 5 U.S.C. §552(b)(4). The BIA withheld in their entirety items numbered 2 and 3 pursuant to FOIA Exemption 4.

72. With regard to the second category of requested records, the BIA's September 18, 2007 letter failed to identify or search for responsive records.

73. The BIA's September 18, 2007 response was timely appealed to the DOI appeals office on October 16, 2007.

74. On October 31, 2007, the DOI confirmed by letter receipt of Plaintiffs' appeal and identified it as FOIA Appeal No. 2008-011.

75. On November 15, 2007, the DOI provided a follow up letter stating that "[s]ince the Department has not made a determination on your appeal within the time limited set in the FOIA, you may seek judicial review under 5 U.S.C. §552(a)(4)(B)."

76. In a letter dated December 5, 2007, the BIA stated that "the FOIA Appeals Office has requested that our offices [sic] to conduct a new search for responsive documents..." In so doing, the agency claimed to have located two new responsive documents regarding category two (alternate sources of water).

77. The records identified in the BIA's December 5, 2007 letter consist of one internal URS Corporation email communication and another, heavily redacted email communication from the URS Corporation to the U.S. Environmental Protection Agency ("EPA"). The BIA has taken the



position that the requested communications are agency records subject to withholding under FOIA Exemption 5. As stated by the agency, “[w]e have determined that the two communications...constitute intra-agency and inter-agency records, respectively and represent the personal opinions, recommendations, and advice of staff members and agency consultants offered in the course of their employment and in the process of informing an agency decision.” The BIA asserted FOIA Exemption 5 (agency deliberative process privilege) to withhold information contained in the email communication from the URS Corporation to U.S. EPA.

78. Upon information and belief, the information contained in the email communication from the URS Corporation to U.S. EPA played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done. Upon information and belief, the information contained in the email communication from the URS Corporation to U.S. EPA does not represent the interests of the URS Corporation, or the interest of any other non-agency client. Upon information and belief, the information contained in the email communication from the URS Corporation to U.S. EPA represents the interests of the agency.

79. Defendant's letters and responses to Plaintiffs' July 18, 2007 Request failed to provide Plaintiffs with a lawful determination on Plaintiffs' request within twenty (20) days, and therefore Defendant have violated FOIA.

80. Defendant has failed to comply with FOIA by failing to make a detailed determination within twenty (20) days of receipt of Plaintiffs' October 16, 2007 appeal and/or failed to identify unusual circumstances that might require an extension of time not to exceed ten (10) additional days. 5 U.S.C. §552(a)(6).

81. Defendant continues to illegally withhold documents in whole or in part requested by

Plaintiffs on July 18, 2007. 5 U.S.C. §552(a)(6).

82. Plaintiffs have brought this case seeking judicial orders compelling timely and lawful compliance with FOIA and release of the records requested in Plaintiffs' July 18, 2007 FOIA Request. In addition to vindicating Plaintiffs' statutory right to access specific agency records, Plaintiffs seek declaratory judgment and permanent injunction in order to halt any future pattern and practice by Defendant to delay and/or evade Plaintiffs' FOIA requests.

83. Plaintiffs intend to continue its use of FOIA to access agency records in the possession of Defendant. One of the purposes of FOIA is to promote the active oversight role of public advocacy groups. Plaintiffs use FOIA to publicize activities of federal agencies and to mobilize the public to participate in the federal agency decision-making processes related to the proposed Desert Rock Energy Project. Declaratory and injunctive relief is necessary to protect Plaintiffs' continued oversight and advocacy through the well-established practice of scrutinizing agency records, a practice Congress intended to promote through the adoption of FOIA.

**C. Plaintiffs' May 3, 2007 FOIA Request ("Navajo Coal Mine Request")**

84. On May 3, 2007, Plaintiff Diné C.A.R.E. filed a FOIA Request ("May 3, 2007 Request" or "Navajo Coal Mine Request") with the BIA.

85. The May 3, 2007 Request was submitted on behalf of Diné C.A.R.E. by Brad A. Bartlett, Esq., Managing Attorney for the Energy Minerals Law Center.

86. The May 3, 2007 Request sought twelve (12) categories of agency records created or obtained by the BIA and related to BIA policies and activities concerning impacts to Navajo Nation tribal members from BHP's mining and leasing operations for the Navajo Mine. Among other things, BHP's Navajo Mine would provide coal to the proposed Desert Rock Energy

Project. Specifically, Diné C.A.R.E. sought:

1. All records of communications between the BIA and Navajo Nation tribal members residing or grazing livestock in the BHP lease area;
2. All records of communications between BHP and Navajo Nation tribal members residing or grazing livestock in the BHP lease area;
3. All records of communications between the Navajo Nation and Navajo Nation tribal members residing or grazing livestock in the BHP lease area;
4. All records of communications regarding Navajo Nation tribal members residing or grazing livestock in the BHP lease area including, but not limited to, communications between BIA, BHP, the Navajo Nation or the Office of Surface Mining;
5. Any and all lists of Navajo Nation tribal members within the BHP lease area including, but not limited to, lists of tribal members in Navajo Mine areas 4 and 5;
6. Any and all lists of Navajo Nation tribal members grazing livestock within the BHP lease area including, but not limited to, lists of tribal members grazing in Navajo Mine areas 4 and 5;
7. Any and all maps or other records which show the location of Navajo Nation tribal members or tribal members grazing livestock;
8. Any and all records dealing with removal or relocation of Navajo Nation tribal members from the BHP lease area;
9. Any and all records dealing with compensation to Navajo Nation tribal members in the BHP lease area;
10. Any and all National Environmental Policy Act ("NEPA") documentation of the impacts to Navajo Nation tribal members in the BHP lease area;
11. All public notices provided to Navajo Nation tribal members in the BHP lease area; and,
12. Any and all other records discussing or dealing with Navajo Nation tribal members in the BHP lease area.

87. The FOIA request provided all information necessary to qualify for a fee waiver.

Specifically, the May 3, 2007 Request demonstrated that: (1) the records concern the operations or activities of the Government; (2) disclosure likely contribute to public understanding of these operations and activities; (3) will release of the requested records contribute significantly to public understanding; disclosure not be for the commercial interest of Diné C.A.R.E.

88. On May 11, 2007, the BIA denied Diné C.A.R.E.'s request for a fee-waiver and the agency refused to release records unless Diné C.A.R.E. first paid a \$1,810.00 estimated processing fee.

89. The BIA determined a fee-waiver was inappropriate on the sole basis that Diné C.A.R.E. did not adequately explain “how [*Diné C.A.R.E.*] will use the requested information to contribute to the understanding of the public at large or a reasonably broad audience of persons interested in the subject.”

90. The BIA’s denial of the fee-waiver to Diné C.A.R.E. was timely appealed to the DOI appeals office on June 14, 2007.

91. A follow up letter was provided to DOI on November 6, 2007.

92. Defendant has failed to comply with FOIA by failing to make a detailed determination within twenty (20) days of receipt of Plaintiffs’ June 14, 2007 appeal and/or failed to identify unusual circumstances that might require an extension of time not to exceed ten (10) additional days. 5 U.S.C. §552(a)(6).

93. Defendant continues to illegally withhold documents in whole or in part requested by Plaintiffs on May 3, 2007. 5 U.S.C. §552(a)(6).

## **V. FIRST CLAIM FOR RELIEF**

**Violation of the Freedom of Information Act** *Defendant Has Failed To Make a Timely Determination on the Alliance’s November 2, 2007 FOIA Appeal Within the Statutorily Prescribed 20 Working Days and Has Illegally Withheld Documents in Violation of FOIA.*

94. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

95. On November 2, 2007, Plaintiff the Alliance filed a timely appeal of the Defendant’s October 5, 2007 FOIA response pursuant to 5 U.S.C. § 552(a)(6).

96. Defendant has violated FOIA, 5 U.S.C. § 552(a)(6)(A)(ii), by failing to timely and lawfully respond to Plaintiff’s November 2, 2007 appeal and request for agency records.

97. Defendant continues to violate FOIA 5 U.S.C. §552(a) by failing to fulfill Plaintiff's August 22, 2007 request for agency records.

98. Defendant continues to violate FOIA by illegally withholding agency records which are not subject to any FOIA withholding provision. 5 U.S.C. § 552(b).

## **VI. SECOND CLAIM FOR RELIEF**

**Violation of the Freedom of Information Act** *Defendant Has Failed To Make a Timely Determination on the Alliance's October 16, 2007 FOIA Appeal Within the Statutorily Prescribed 20 Working Days and Has Illegally Withheld Documents in Violation of FOIA.*

99. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

100. On October 16, 2007, Plaintiffs the Alliance and Diné C.A.R.E. filed a timely appeal of the Defendant's September 18, 2007 FOIA response pursuant to 5 U.S.C. § 552(a)(6).

101. Defendant has violated FOIA, 5 U.S.C. § 552(a)(6)(A)(ii), by failing to timely and lawfully respond to Plaintiff's October, 2007 appeal and request for agency records.

102. Defendant continues to violate FOIA 5 U.S.C. §552(a) by failing to fulfill Plaintiff's July 18, 2007 request for agency records.

103. Defendant continues to violate FOIA by illegally withholding agency records which are not subject to any FOIA withholding provision. 5 U.S.C. § 552(b).

## **VII. THIRD CLAIM FOR RELIEF**

**Violation of the Freedom of Information Act** *Defendant Has Failed To Make a Timely Determination on the Alliance's October 16, 2007 FOIA Appeal Within the Statutorily Prescribed 20 Working Days and Has Illegally Determined That Plaintiff Diné C.A.R.E. Does Not Qualify for a Fee-Waiver.*

104. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

105. On June 14, 2007, Plaintiff Diné C.A.R.E. filed a timely appeal of the Defendant's May 11, 2007 FOIA response pursuant to 5 U.S.C. § 552(a)(6).

106. Defendant has violated FOIA, 5 U.S.C. § 552(a)(6)(A)(ii), by failing to timely and lawfully respond to Plaintiff's October, 2007 appeal and request for agency records.

107. Defendant continues to violate FOIA 5 U.S.C. §552(a) by failing to fulfill Plaintiff's June 14, 2007 request for agency records.

108. Judicial review of Plaintiffs' fee waiver claim is conducted de novo. 5 U.S.C. §552(4)(A)(vii).

109. Defendant continues to violate FOIA by illegally determining that Plaintiff Diné C.A.R.E. does not qualify for a fee-waiver under FOIA. 5 U.S.C. §552(a)(4)(iii) and (viii). withholding agency records which are not subject to any FOIA withholding provision. 5 U.S.C. § 552(b).

### **VIII. REQUEST FOR RELIEF**

FOR THESE REASONS, Plaintiffs respectfully requests that this Court enter judgment providing the following relief:

1. Enter judicial findings that Defendant violated FOIA by failing to lawfully respond to Plaintiffs' November 2, 2007, October 16, 2007 and June 14, 2007 FOIA appeals in accordance with the statutory deadline;
2. Declare that Defendant violated FOIA by failing to produce requested agency records responsive to Plaintiffs' August 22, 2007 and July 18, 2007 requests for agency records accordance with the statutory deadline;
3. Declare that Defendant continues to violate FOIA by illegally withholding documents

that are not subject to a lawful FOIA Exemption (5 U.S.C. § 552(b));

4. Declare that Defendant continues to violate of FOIA by failing to lawfully respond to Plaintiffs' FOIA requests dated August 22, 2007 and July 18, 2007;

5. Declare that Defendant violated FOIA by illegally determining that Plaintiff Diné C.A.R.E. does not qualify for a fee-waver under FOIA.

6. Direct by Order that Defendant immediately provide Plaintiffs a lawful determination on the August 22 and July 18, 2007 requests;

7. Direct by Order that Defendant immediately provide Plaintiffs all records responsive to the August 22 and July 18, 2007 requests;

8. Direct by Order that Defendant immediately process Plaintiffs' May 3, 2007 FOIA request within twenty (20) working days;

9. Retain jurisdiction until sixty (60) days after the records have been released and Plaintiffs' May 3, 2007 FOIA request processed;

10. Direct by permanent injunction that Defendant provide timely, full, and lawful responses to Plaintiffs ongoing use of FOIA to access agency records;

11. Grant the Plaintiffs their costs of litigation, including reasonable attorney fees as provided by FOIA, 5 U.S.C. § 552(a)(4)(E);

12. In the alternative, grant the Plaintiffs their costs of litigation, including reasonable attorney fees as provided by the Equal Access to Justice Act, 28 U.S.C. § 2412; and

13. Provide such other relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED April 2, 2008,

/s/ Erik Schlenker-Goodrich

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